INTERNATIONAL STEEL GROUP INC.
3250 Interstate Drive 2nd Floor
Richfield, Ohio 44286-9000
330-659-9100

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POSITION PAPER ON THE SECOND DRAFT TEXT OF THE FREE TRADE AREA OF THE AMERICAS AGREEMENT:

CHAPTER ON SUBSIDIES, ANTI-DUMPING AND COUNTERVAILING DUTIES

Submitted by

International Steel Group Inc.
Mitchell Hecht
Vice President, External Affairs and Public Policy

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Second Draft Consolidated Texts of the
Free Trade Area of the Americas Agreement

Chapter on Subsidies, Anti-Dumping and Countervailing Duties

Introduction

International Steel Group Inc. ("ISG") appreciates this opportunity to present these comments on the Second Draft Consolidated Texts of the Free Trade Area of the Americas ("FTAA") Agreement. ISG is the second largest integrated steel producer in the United States, with eleven steel production facilities located in Illinois, Indiana, Maryland, Ohio, New York and Pennsylvania.

ISG notes that the chapter on subsidies, anti-dumping and countervailing duties is completely bracketed, indicating that every provision is objectionable to one or more FTAA countries. ISG believes that the final FTAA text should contain provisions relevant to a free trade agreement, and not a customs union. In this respect, ISG strongly disagrees with the creation of a special antidumping and countervailing duty regime in the context of the FTAA. No members' rights under the World Trade Organization ("WTO") should be modified by the FTAA. Unfortunately, the chapter on subsidies, anti-dumping and countervailing duties (the "Rules Chapter") of the second draft consolidated text of the FTAA contains many provisions which, if adopted, would detract substantially from the current WTO Agreements in the rules areas, as between Parties to the FTAA. Many of the second draft FTAA provisions weaken existing trade remedies, either by making it more difficult to initiate an investigation or by serving to substantially reduce margins. More importantly, many of the provisions, without further modification, would seriously impede Parties' ability to take advantage of such trade remedies.

The Americas Business Forum is presumably interested in advancing a final FTAA text that will enjoy the support of the U.S. Congress. When Congress granted trade promotion authority to the President in 2002, it directed the United States Trade Representative ("USTR") to "preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies..." Trade Act of 2002, PL 107-210, Sec. 2102 (b)(14), 116 STAT. 1001 (emphasis added). Accordingly, any proposal that would change existing U.S. trade remedy laws or Members' obligations under the WTO Anti-Dumping or Subsidies and Countervailing Measures Agreement should be rejected as a non-starter.

It is the position of ISG that the FTAA chapter on subsidies, anti-dumping and countervailing duties should either be rejected in its entirety or, at an absolute minimum, be substantially modified so as to more closely follow the WTO Agreements on trade remedies. The following comments outline suggested changes to the current draft text that would serve to strengthen the chapter on subsidies, anti-dumping and countervailing duties and bring it into conformity with existing trade practices and agreements. FREETAC emphasizes that the following list is not exhaustive.

Recommendations on Specific Provisions of the Second Draft FTAA Text

Article 2.1: Constructed Value: Proposed Article 2.1(b) of the Rules Chapter currently does not allow

the use of constructed value ("CV") where there is a comparable third country price. This limitation on the use of CV ignores the possibility that a comparable third country price may be unfair (e.g., because they are also below normal value), thereby unjustifiably reducing margins. Moreover, the third proposal for Article 1.1 of the Chapter explicitly states that in applying antidumping duty measures, Parties shall abide by the rights and obligations established under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (" WTO Anti-Dumping Agreement"). Article 2.2 of the WTO Anti-Dumping Agreement *does not*, however, contain equivalent restrictions on the use of CV. Significantly limiting the use of CV as proposed by the FTAA text would depart from the existing obligations under the WTO Anti-Dumping Agreement as well as weaken the antidumping remedy.

Recommendation: Modify Article 2.1 to allow the use of constructed value even where there is a comparable third country price.

Article 2.3: Below Cost Sales: Article 2.3 of the FTAA text sets forth requirements for when sales below per unit cost are made in substantial quantities. The first proposal to Article 2.3 of the FTAA text explicitly states that its purpose is based on footnote 5 of Article 2.2.1 of the WTO Anti-Dumping Agreement. However, Article 2.3(b) specifies that below cost sales are not made in "substantial quantities" unless they account for "at least 40% of the volume sold in transactions under consideration for the determination of the normal value." This requirement is twice the threshold of 20% set forth in footnote 5 of Article 2.2.1 of the WTO Anti-Dumping Agreement, and thus substantially departs from that Agreement. The proposed language permits normal value to be based in large part on below-cost sales, the result of which would be reduced dumping margins.

Recommendation: Modify the first proposal to Article 2.3 to reflect the WTO's 20% standard for "substantial quantities."

Article 2.4: Constructed Value and Profit: As currently written, Article 2.4 would prohibit the inclusion of profits in the calculation of constructed value where domestic sales are ruled out because they are being made at a loss. Not only is the proposed language contrary to Article 2.2 of the WTO Anti-Dumping Agreement (which provides that profit is one of the elements of constructed value), but its retention would also diminish dumping margins.

Recommendation: Eliminate Article 2.4 altogether. Once the proposed language is modified to be consistent with the WTO Anti-Dumping Agreement, proposed Article 2.4 becomes extraneous.

Article 2.6: Export Price: Article 2.6 of the FTAA text prohibits authorities from using constructed export prices unless the affiliation between the importer and the exporter causes the export price to be unreliable. The second sentence to Article 2.6 further elaborates that the affiliation between the importer and exporter is not dispositive in that if the affiliation is shown not to affect the price, the authorities may not resort to constructed export price. This proposal is contrary to Article 2.3 of the WTO Anti-Dumping Agreement, which acknowledges that a price between affiliated parties may reasonably be assumed to be affected by the affiliation. Without further modification, the FTAA text inverts the burden of proof by assuming that a price between affiliated parties is not unreliable unless further examination proves otherwise.

Recommendation: Modify Article 2.6 to prohibit the use of an export price between affiliated parties.

Article 2.8: Zeroing: Each of the three proposals for Art. 2.8 would prohibit zeroing. The proposals are all contrary to U.S. practice and are non-starters insofar as the United States is concerned. While the ABF may have adopted a "consensus" position on zeroing in Quito, ISG believes that inclusion of any provision which prohibits zeroing would be sufficient grounds for rejection of the entire chapter by the U.S. Congress. ISG urges the ABF to seriously reconsider its position on this issue.

Recommendation: Modify Article 2.8 to delete any reference that would prohibit the practice of zeroing.

Article 3.3: Cumulation: If adopted, Article 3.3 would preclude an investigating authority from making a cumulative assessment of the effect of imports from a small economy in order to determine injury. The proposal ignores the rationale behind cumulation; namely, that the impact of a given volume of unfairly traded imports is not lessened where that volume includes smaller suppliers. Moreover, Article 3.3 of the WTO Anti-Dumping Agreement does not provide for such a limitation.

Recommendation: Modify Article 3.3 to allow investigating authorities to include imports from a small economy in their cumulation assessments.

Article 3.5: Material Injury Finding: Article 3.5, first sentence, of the FTAA text requires that "in order to determine the existence of material injury, there shall normally be a requirement that the domestic industry incur losses during the determined period." By contrast, Article 3.4 of the WTO Anti-Dumping Agreement allows for a non-exhaustive comprehensive analysis with respect to an examination of the impact of dumped imports on the domestic industry. There is no requirement in the WTO Anti-Dumping Agreement that the domestic industry must be incurring losses during the examined period. Such a requirement unjustifiably restricts the investigating authorities from finding material injury. For example, an industry that experiences a 50 percent decline in profits in a three year period but has not yet incurred actual losses would presumably consider itself "materially injured." The proposed language would bar this industry from obtaining relief.

Recommendation: Modify Article 3.5 to exclude the requirement that a finding of material injury should "normally" be contingent upon the domestic industry experiencing losses.

Article 5.1: Initiation of Investigation: The second sentence of the current draft text of Article 5.1 of the FTAA would preclude initiation of an antidumping investigation if the collective output of domestic producers constitutes less than 50% of the total production of the like product. By contrast, Article 5.4 of the WTO Anti-Dumping Agreement provides that an investigation cannot be initiated if the application is supported by less than 50% of the total production of *those producers that either support or oppose the application* (a lower threshold because it does not include those producers that take no position), and if those producers that expressly support the application represent less than 25% of total production of the like product. The FTAA text's more stringent initiation requirements would significantly reduce access to the antidumping remedy by industries injured by dumped imports. This is especially true in light of the FTAA's proposed definition of domestic industry in Article 4.1, which would not permit the exclusion of related parties or provide for regional industries.

Recommendation: Modify Article 5.1 to reflect the same or similar requirements for initiation as those found in the WTO Anti-Dumping Agreement. Further modify Article 4.1 to permit exclusion of related parties in appropriate circumstances and provide for regional industry cases.

Article 5.5: Termination of Investigation: Article 5.5 requires terminating an investigation if the dumping margin is lower than 5%, or the import volume is less than 7% of imports, or less than 5% of domestic consumption. Article 5.8 of the WTO Antidumping Agreement, by contrast, only requires that the dumping margin be at least 2% and that imports be at least 3% of total imports. The FTAA proposal ignores the fact that small margins and import shares may be significant, depending on the industry. The proposal would impede the ability of industries with price-sensitive products and low elasticity of demand from obtaining adequate relief.

Recommendation: Modify Article 5.5 to reflect the same standard for terminating an investigation as that found in the WTO Anti-Dumping Agreement (i.e., 2% dumping margin, imports 3% of total imports).

Article 5.6: Period for completing investigations: The provision requires that any investigation be completed within one year from initiation, or longer under special circumstances, although the additional time period is not yet agreed upon. Article 5.10 of the WTO Anti-Dumping Agreement allows flexibility to expand the period to 18 months. To the extent that the FTAA adopts a shorter period of time, the proposal may decrease flexibility to accommodate more complex cases.

Recommendation: Modify Art. 5.6 to permit investigations to be extended to 18 months.

Article 7.1: Preliminary Relief: The second paragraph of Article 7.1 of the FTAA text would permit preliminary relief only where the injury to the domestic industry "is not adequately compensable unless interim relief is granted." Article 7.1 of the WTO Anti-Dumping Agreement, however, permits preliminary relief whenever an affirmative preliminary anti-dumping determination is reached. Preliminary relief is warranted whenever an affirmative finding of dumping is reached.

Recommendation: Modify Article 7.1 of the FTAA to provide for interim relief in the instance of a preliminary affirmative determination.

Article 9.1: Lesser Duty Rule: Article 9.1 of the FTAA text mandates that the final anti-dumping duty be less than the dumping margin if "adequate to remove the injury or threat of injury to the domestic industry." The proposed language conflicts with Articles 8.1 and 9.1 of the WTO Anti-Dumping Agreement, which do not mandate use of a lesser duty. Accordingly, the required application of the lesser duty rule would result in reduced margins and ultimately weaken the remedy.

Recommendation: Modify Article 9.1 of the FTAA text to exclude the mandatory application of the lesser duty rule with respect to both anti-dumping and countervailing duty cases.

Article 10.2: Duration and Review of Remedy: The first and third proposals would require removal of antidumping order at expiration of a period without possibility of extension. The second proposals

requires expiration of an order after 8 years, where imports are negligible. The proposals are contrary to WTO Anti-Dumping Agreement Art. 11, which provides for five-year reviews to determine whether orders should continues, and permits extensions whenever required to counteract dumping and injury.

Recommendation: Modify Article 10.2 to provide for five-year reviews of orders and extension where expiration is likely to lead to continued dumping and injury.